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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~801~~ 71

E. B. ARENDER, MARCUS N. STRONG, NEAL McEACHARN, JR., ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, SOHIO PETROLEUM COMPANY, GEORGE A. MITCHELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT AS TO JURISDICTION

CLYDE R. BROWN,
JAMES H. TROUSDALE, JR.,
Counsel for Appellants.

IN THE SUPREME COURT OF LOUISIANA

No. 40,441

E. B. ARENDER, MARCUS N. STRONG, NEAL McEACHARN, JR., ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, SOHIO PETROLEUM COMPANY, GEORGE A. MITCHELL, ET AL.

JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rule 12, Paragraph 1, appellants file this statement particularly disclosing the basis on which they contend that the Supreme Court of the United States has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

1

The statute believed to sustain appellate jurisdiction is *Section 1257 of Title 28 of the United States Code* which provides that a final judgment rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court by appeal where there is drawn in question the validity of a statute of a State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

2

The Statute of the State of Louisiana, the validity of which is involved, is *Act 157 of the Louisiana Legislature for 1940*, appearing at Page 610 of the official edition of the Acts passed by the Legislature of Louisiana for said year and also referred to as *Louisiana Revised Statutes of 1950, Title 30*, appearing at Page 634 of the official edition thereof, the pertinent portion of which reads as follows:

> Section 8(b) "For the prevention of waste and to avoid the drilling of unnecessary wells, the Commissioner shall establish a drilling unit or units for each pool, except in those pools which, prior to the effective date of this Act, have been developed to an extent and where conditions are such that it would be impracticable or unreasonable to use a drilling unit at the present stage of development. A drilling unit, as contemplated herein, means the maximum area which may be efficiently and economically drained by one well, and *such unit shall constitute a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities.*" (Emphasis ours.)

Appellants brought suits for the cancellation of mineral leases affecting their properties. Said properties lie within a drilling and production unit established by the Commissioner of Conservation of Louisiana by virtue of the statutory authority set forth above. A capped well capable of producing gas in commercial quantities is situated within the said unit. The well was capped by defendant lessee following its completion in September 1946 and has remained shut-in ever since. One of the causes for which appellants demanded termination of said leases is that defendant lessee failed to pay the annual delay rentals specified in Paragraph 5 of the lease contracts to be due and pay-

able on May 23, 1947 following the drilling of the gas well from which production ceased. The lease contracts provide that they shall terminate ipso facto unless the said rentals are timely paid. No constitutional issue was raised in the Trial Court. Copies of the original opinion and the opinion on motion for new trial of the Trial Court are attached hereto. On appeal the Supreme Court of Louisiana invoked the provision of said Act 157 of 1940 (LRS 30:9B) which is quoted above as having the effect of superseding and rendering inapplicable the lease contract provisions specifying the payment of annual delay rentals, or the automatic termination of the leases in the event of their non-payment. The reasoning of the Supreme Court of Louisiana appears to be that, since under the said statute, the drilling of a well capable of producing gas, but capped and not producing gas, constituted the unit "a developed area", and the drilling of additional wells on the unit was prohibited (unless an exception be granted), then lessee is relieved by the operation of said statute of the stipulated obligations to pay annual delay rentals in lieu of payment of royalty or of continued drilling or reworking operations; the effect being to deprive appellants of any rentals whatever for their properties and of the right to the automatic termination of the leases on account of the non-payment of said rentals.

Thus, the provisions of said Statute were first raised and resorted to by the Supreme Court of Louisiana in deciding the appeal. Appellants timely filed a motion for rehearing in the Supreme Court of Louisiana in which appellants alleged that the said Statute, as interpreted and applied herein by said Supreme Court, is repugnant to the Fourteenth Amendment to the Constitution of the United States in that it thereby deprives a person of his property without due process of law.

4

Appellants' application for rehearing was refused by the Supreme Court of Louisiana (Justice Hawthorne dissenting) without reasons being given therefor. There is attached hereto and made a part and portion hereof an order by the Supreme Court of Louisiana in which it is stated that the said Supreme Court, in refusing to grant said application for rehearing, considered the question raised by appellants of the constitutionality of the said statute and determined that it is not repugnant to the Constitution of the United States.

3

The questions involved herein are substantial in that appellants, citizens of the United States, and the owners of oil and gas producing lands, are being deprived of rentals for their property (or the right to the termination of the leases on account of Lessee's failure to pay the rentals) because the Supreme Court of Louisiana has, in these cases, interpreted a Louisiana statute as having the effect of doing away with the payment of rentals (the only rentals) to appellants under the terms of the lease contracts. The police power of the State of Louisiana by said decision of the Louisiana Supreme Court has been extended to the total and complete abolition of rent, which is entirely unrelated to the conservation of natural resources. The property involved herein is substantial, and the constitutional rights of appellants herein are also substantial.

4

The cases believed to sustain jurisdiction herein are:

Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Company, v. *George W. Bay and William Bay*, 200 U. S. 179, 26 S. Ct. 208

Whitney v. *People of State of California*, 274 U. S. 357, 47 S. Ct. 641

5

Great Northern Ry. Co. v. *Sunburst Oil and Refining Co.*, 287 U. S. 358, 53 S. Ct. 145

Missouri ex rel. Missouri Insurance Co. v. *Gehner*, 281 U. S. 313, 50 S. Ct. 326.

5

The Supreme Court of Louisiana refused a rehearing herein (holding the statute constitutional) on January 12, 1953, as appears from the copy of the decree attached hereto. A copy of the original judgment of said Supreme Court is also attached hereto.

6

The application for an appeal was presented on February 25, 1953, as appears from Page 134 of the transcript filed herein.

Respectfully submitted,

SHOTWELL & BROWN,
By CLYDE R. BROWN
JAMES H. TROUSDALE, JR.,
Counsel for Appellants.

EXHIBIT "A"

OPINION OF THE SUPREME COURT OF LOUISIANA

No. 40,441

SOHIO PETROLEUM COMPANY

v.

V. S. & P. R. R., ET ALS

FOURNET, Chief Justice.

The plaintiffs, owners of certain lots or mineral interests in lots lying within the city limits of Delhi, Louisiana, situated in the NE/4 of the SE/4 of Section 13, T. 17 N., R. 9 E., Richland Parish, instituted suits (27 in all) against George R. Mitchell and Carl B. Anderson, in whose favor they had executed oil and gas leases, and against their assignee, the Kingwood Oil Company, seeking the cancellation of the leases and for an accounting of the oil produced thereunder. They are now appealing from a judgment dismissing their suits and ordering the distribution of certain funds realized from this oil, placed in the registry of the court by the Sohio Petroleum Company, the purchaser, in a concursus proceeding provoked by this company because of a dispute existing among the claimants as to the basis on which this fund should be distributed.

The leases in controversy were all acquired by Mitchell and Anderson, either personally or through assignment, during the early part of 1946, principally during the months of May and June, and were by them assigned to the Kingwood Oil Company (hereinafter referred to as Kingwood) on September 30, 1946. Only one was introduced in evidence, it having been agreed by counsel they were identical for all intents and purposes. Each lease was for a cash consideration, the exhibit in the record disclosing the cash consideration to have been $200, and conditioned that a well be drilled on the property within one year from date on penalty of the lease's termination as to both parties unless, on or be-

fore the anniversary date, the payment of $1.00 be paid or tendered for the deferment of this obligation for an additional 12 months, a similar payment delaying drilling operations during any succeeding 12-month period. Article 4. Article 2 provides that the primary term is for 10 years, and "as long thereafter as oil, gas or other mineral is produced from said land or land with which said land is pooled hereunder." Article 3 (c) provides that "Where gas from a well producing gas only is not sold or used because of no market or demand therefor, lessee may pay as royalty $50.00 per well, per year, payable quarterly, and upon such payment it will be considered that gas is being produced within the meaning of Article 2 of this contract." Article 5 provides: "If prior to discovery of oil, gas, sulphur or other mineral on said land, lessee should drill a dry hole or holes thereon, or if after discovery of oil, gas, sulphur or other mineral, the production thereof should cease from any cause, this lease shall not terminate if lessee commences operations for additional drilling or reworking within sixty days thereafter or (if it be within the primary term)*** commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production." This same article gives the lessee the right "in order to form a drilling unit or units to conform to regular or special spacing rules issued by the Commissioner of Conservation of the State of Louisiana, or by any other state or federal authority having control of such matters, or in order to conform to conditions imposed upon the issuance of drilling permits * * * at its option * * * to pool or combine the lands covered by this lease, or any portion or part thereof, with other land, lease or leases in the immediate vicinity thereof * * *."

Shortly after the discovery of the Delhi Field, the Department of Conservation, on May 31, 1945, following a public hearing, issued its basic Order No. 96, providing special rules and regulations governing the production of oil and gas from the Holt Zone and the May Sand in the Delhi Field, among these being the establishment of drilling and proration units of approximately 40 acres, following the

regular outlines of governmental one-sixteenth sections. The owners of the tracts of land, leases, and mineral interests within these units were, either voluntarily or compulsorily, to pool their interests for the drilling of the only well permitted on each tract, to be located not more than 200 feet from the center thereof. This order further provided for the allocation of the production in the proportion that the area of each tract bore to the composite whole, for an allowable to be fixed on the basis of the known productive area of each sand, for tests for oil and gas ratios and bottom hole pressures, etc.

On August 19, 1946, the Department of Conservation granted Kingwood a permit to drill an oil well in the approximate center of the NE/4 of the SE/4 of Section 13 (within which sixteenth section the property in these suits lies). This was brought in shortly thereafter as a gas well, capable of producing 3,970,000 cubic feet of gas daily through a 3/8th chock, and having a tubing pressure of 1,200 pounds per square inch. The gas-oil ratio was left blank, denoting there was not sufficient fluid or distillate in the well to be gauged at the time the test was made by the Department of Conservation on October 11, 1946. This well, designated the Kingwood-Jones No. 1, was capped immediately.

Subsequently Kingwood began the drilling of the Kingwood-Jones No. 2 well, pursuant to Order No. 96-A-7 of the Commissioner of Conservation issued on August 8, 1947, as an exception to Order No. 96, after a full hearing during which the Commissioner found from the facts adduced the No. 1 well was not commercially productive of oil from any of the sands under special order in the Delhi Field, but that a portion of the tract appeared to be potentially productive of oil from the Holt Zone and the location of the new well appeared to be in the center of this productive acreage. This well was brought in in September of 1947 producing oil in commercial quantities and its production, including the royalty of the land and mineral owners, was sold to the Sohio Petroleum Company, being taken into the pipe line of this company attached to the well.

On May 25, 1950, Mrs. Ina Mae McEacharn, individually and as the natural tutrix of her minor children, instituted suit to cancel the lease executed by her on July 6, 1946, and for an accounting of the oil produced from the Kingwood-Jones No. 2 well, which had been drilled on her property, on the ground that the lease and its assignment to Kingwood had "terminated for non-payment of rent and/or royalty." On the same day George R. Sumlin instituted a suit to have his lease cancelled, contending it terminated because he never agreed to pool his property and no well had been drilled on his tract or rental paid in accordance with the lease provisions. In the alternative, he alleged that if the court found his property had been pooled with other property on which an oil well was drilled, then, inasmuch as his property is situated within the acreage designated by the Department of Conservation in its Order No. 96-A-7, authorizing the issuance of the permit for the drilling of the Kingwood-Jones No. 2 well, his lease terminated anyway because of the non-payment of his prorata share of the rent and/or royalty.

On June 14, 1950, the Sohio Petroleum Company (hereinafter referred to as Sohio), filed a concursus proceeding depositing in the registry of the court a sum alleged to be due for the production from the Kingwood-Jones No. 2 well, the basis for the distribution of which it was unable to determine under the various orders issued by the Commissioner of Conservation, and over which a dispute existed among the claimants, some contending the fund should be distributed to the owners in the entire NE/4 of the SE/4 of Section 13, while others contended only the owners within the productive area found to exist in this sixteenth section, as outlined in the plat attached to Order No. 96-A-37 and containing 19.03 acres, were entitled to share it.

On July 17, 1950, Mrs. McEacharn and Sumlin amended and supplemented their original petitions, pleading, in the alternative, as an additional cause for the cancellation of their respective leases, that prior to the drilling of the Kingwood-Jones No. 2 well, Kingwood had drilled a gas well, the Kingwood-Jones No. 1, on the unit in controversy, that was shut-in on October 21, 1946, and on which the com-

pany had failed to pay the shut-in well royalty of $50 a year, as provided in Article 3 of their leases.

Long after the concursus was filed, numerous land and mineral owners in the area designated as productive for the drilling of the Kingwood-Jones No. 2 well, instituted additional suits for the cancellation of their leases, eleven on September 11, 1950, and fourteen on November 2, 1950, setting forth the same cause of action set forth by Sumlin in his original and amended petitions. All of these plaintiffs are represented by the same attorneys who instituted the Sumlin and McEacharn suits.

After a number of exceptions and preliminary pleadings filed by the defendants had been disposed of and they had moved for the consolidation of the concursus proceeding with the Sumlin and McEacharn cases, Kingwood, Mitchell, and Anderson, on September 25, 1950, answered denying these plaintiffs had the right to terminate their leases and averring the several properties had been pooled pursuant to orders of the Commissioner permitting the drilling of only one well on the NE/4 of the SE/4 of Section 13, which well was drilled by Kingwood within the year, as the lease provided, and was brought in as a gas well capable of producing in paying quantities but that it was capped under government regulations; that they were thereafter prohibited from drilling an additional well on the property until the Commissioner granted an exception to Order No. 96 on August 8, 1947, immediately following which the Kingwood-Jones No. 2 well was drilled, and it was, at the time of suit, still producing oil in paying quantities. They further averred that inasmuch as the lessors had failed to provide the tanks at the well for their share of the production, as stipulated in the lease contracts, it had been delivered into the lines of Sohio to their credit and an accounting thereof was being rendered in the concursus provoked by that company. The answers filed by these defendants in all of the other suits are to the same effect. Their answers to the concursus are, generally, affirmations of the allegations of Sohio.

The plaintiffs, answering the concursus on September 27, 1950, denied there was any controversy over the funds, the

attempt to create one being merely an excuse for failure to pay rents and royalties. They averred the concursus was necessitated solely by the neglect of Kingwood "to do and perform normal, usual, and ordinary acts in its management and operations under" the leases, and prayed that Kingwood be taxed with the costs of the proceeding. They maintained, *alternatively*, that the leases held by Kingwood had terminated prior to the drilling of the oil well because of failure to pay (1) rentals, (2) shut-in well royalties, and (3) rent and/or royalty for a period exceeding two and a half years. Averring in a supplemental answer that these funds had been wrongfully withheld by Sohio during the period between the first purchase and the institution of the concursus, they sought interest at the rate of 6% per annum.

On the merits, the trial judge dismissed the suits for the cancellation of the leases. In the concursus he ordered the funds distributed among the owners of the entire 40-acre tract for the period prior to September 21, 1949, and among the owners in the 19.03 acre unit outlined on the plat attached to Order No. 96-A-37 from that date on. On rehearing he amended this judgment, ordering the distribution of the fund on the basis of 19.03 acreage only. He did not allow interest and ordered the costs to be paid out of the fund on deposit. The plaintiffs alone have appealed. The question of whether those having interests outside the 19.03 acreage have any claim to this money is, therefore, no longer at issue.

The primary cause urged by all of the plaintiffs (with the exception of the McEacharns, on whose property the oil well was drilled) for the cancellation of their leases was that they terminated because of no drilling on their property within the year and the failure to pay rent for delaying this drilling; further, that their property was never unitized, either voluntarily or compulsorily, with any property on which there was drilling. This has been abandoned, as it must, for the obvious reason that the leases of the plaintiffs, as shown above, specifically authorized the lessee, 'in order to form a drilling unit or units to conform to regular or special spacing rules issued by the Commissioner of Con-

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servation of the State of Louisiana * * * to pool or combine the lands covered by this lease, or any portion or part thereof, with other land, lease or leases in the immediate vicinity thereof * * *." And, under Article 2 of the leases it is stipulated that the primary term of the lease is to continue for so long after 10 years "as oil, gas or other mineral is produced from said land or land with which said land is pooled hereunder."

As pointed out by this court in the case of LeBlanc v. Danciger Oil & Refining Company, 218 La. 463, 49 So. 2d 855, "* * * all contracts of lease with respect to the development and production of minerals in this state must, of necessity, be subject to the police power exercised in protecting these natural resources, and that any provisions in our law with respect thereto form a part of these lease contracts the same as though written therein, a fact of which the parties to the original lease themselves took full cognizance when they included a provision in the lease subjecting it to state and federal laws regulating the production and operation on the land." Hence, when the Commissioner of Conservation, acting under the provisions of Act 157 of 1940, as amended, fixed the maximum area that might be efficiently and economically drained by one well in the Delhi Field as 40 acres, following the governmental sixteenth sections, the owners of such tracts to share ratably according to their ownership, such units, according to the provisions of Section 8 (b) of Act 157 of 1940 (R. S. 30:9B), constitute "a developed area as long as a well is located thereon which is capable of producing oil or gas in paying quantities."

Consequently, when the Kingwood-Jones No. 1 well was completed as a well capable of producing gas in paying quantities, within the year provided in the lease, the area forming this drilling unit was considered to be a developed area within the meaning and contemplation of the act, and Article 5 of the lease is inapplicable. In fact, another well could not have been drilled on this same unit without specific authorization, as secured in this case, i. e., by obtaining an order from the Commissioner of Conservation, following a full hearing and based upon his findings, warranting such

exception to basic Order No. 96. It necessarily follows that the lease did not terminate for failure to pay rentals.

Article 3 of the lease, relied on by the plaintiffs as an alternative ground for the cancellation of their lease, does not provide for a forfeiture of the lease in the event of the failure of the lessee to pay the shut-in well fee or royalty of $50.00 a year. The payment of this royalty is not made a condition precedent for the continuation of the lease. Instead, the provision makes it optional with the lessee to make such payment if he wants it "to be considered that gas is being produced within the meaning of Article 2" of the contract, i. e., the primary term is to be continued so long as minerals are produced.

Obviously counsel who represented all of the plaintiffs entertained the same view for, in filing the McEacharn and Sumlin suits, the first two filed, they based them (except for the non-unitization feature in the Sumlin suit) on the failure of the defendants to pay the royalty that had accrued from the production on the Kingwood-Jones No. 2 well. In the basic allegations of these petitions it is simply declared that the lease executed by the plaintiff was assigned by sub-lease to Kingwood on September 30, 1946, and, pursuant to an order of the Commissioner issued August 8, 1947, this company drilled a well, the Kingwood-Jones No. 2, that has since been producing oil in paying quantities, and that although approximately 35,000 barrels of oil had been produced at the time of the institution of the suit, he had received no accounting therefor; consequently, the lease and its assignments "terminated for nonpayment of rent and/or royalty," entitling the plaintiff to a judgment cancelling the lease and to an accounting of the oil produced. It was only after the concursus was provoked that the contention was urged, for the first time and as an additional clause for the cancellation, that the defendants had failed to pay the shut-in fee on the No. 1 well.

Plaintiffs' final argument, i. e., that the leases terminated for failure to pay the royalty due for over two and a half years, is equally without merit. Under the express terms of the contract plaintiffs were entitled to 1/8th of the oil or hydrocarbons produced, "to be delivered at the well in

tanks provided by lessor, or to the credit of lessor into the pipe line to which wells may be connected." Hence, plaintiffs having failed to furnish tanks for their 1/8th, Kingwood literally complied with this provision by delivering the entire production into the pipelines of Sohio. Such compliance relieved this company of any further obligation with respect to this royalty.

Having reached this conclusion, we find it unnecessary to discuss the several authorities relied on by the plaintiffs, as they are neither apposite from a factual or legal standpoint.

We are in full accord with the finding of the trial judge that under the particular facts of this case it would have been difficult, and most unsafe, for Sohio to pay these royalties to anyone until the order of the Commissioner of September 21, 1949, became final upon the formal denial of a rehearing on December 21, 1949, and even then some of the property owners outside the 19.03 acreage were still claiming a share in this production, as evidenced by their appearance in the consursus proceeding.

We think the actions of the plaintiffs, as revealed by the record, disclose they shared the same view. Clearly their main purpose in executing the leases was to have *oil* produced from their acreage and to receive their just share of the royalties from such production. Yet they waited until after the last of these orders became final—a period of over two and a half years after the well was brought in—before bringing their suits.

Under these facts, we do not think the plaintiffs are entitled to the interest claimed, nor do we think we are authorized to tax the costs against Kingwood. See, Section 6 of Act 123 of 1922, as amended by Act 242 of 1944. (R. S. 13:4816.0

For the reasons assigned, the judgment appealed from is affirmed.

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E. B. ARENDER, MARCUS N. STRONG, NEAL McEACHARN, JR., ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, SOHIO PETROLEUM COMPANY, GEORGE A. MITCHELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS BY CARL B. ANDERSON AND GEORGE R. MITCHELL.

GEO. GUNBY,
ALLEN B. GUTHRIE,
Counsel for Appellees.

SUPREME COURT OF LOUISIANA

No. 40,441

SOHIO PETROLEUM COMPANY

vs.

V. S. & P. R. R., ET ALS.

GEORGE R. SUMLIN, ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, ET AL.,

Appellees,

AND

26 CONSOLIDATED CASES

JURISDICTIONAL STATEMENT OF APPELLEES, CARL B. ANDERSON AND GEORGE R. MITCHELL, DENYING JURISDICTION OF UNITED STATES SUPREME COURT AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

Carl B. Anderson and George R. Mitchell, Appellees, with respect, represent that the United States Supreme Court is without jurisdiction on appeal herein under the provisions of 28 U.S.C. 1257, for the following reasons:

I. Federal Question Not Timely Presented

The Supreme Court of Louisiana in finding and holding in this case (reported 62 So. 2d 615) that drilling and com-

pletion by lessee of a well capable of producing gas in paying quantities upon one of the several tracts forming the drilling and production unit consisting of the governmental one-sixteenth section, NE¼ of SE¼, S. 13, T. 17N., R. 9E., as established by orders of the Louisiana Commissioner of Conservation pursuant to provisions of La. Acts 1940, No. 157 (La. Rev. Stat. 30: 2-20), within the year from date of such leases, constituted a drilling upon and performance of the obligations due upon each of the several separate tracts composing such unit and rendered inapplicable the provisions of Article 5 of said leases relating to drilling of a dry hole or cessation of production from the lease, once begun, because of failure of such production to continue, was an affirmation of the judgment and decision of the Fifth Judicial District Court, wherein the cases were tried upon the pleadings and evidence adduced thereon, as will appear from the Reasons for Judgment rendered by that court upon the original trial before it. And in neither the original pleadings, nor in the application of plaintiffs (appellants) for new trial or rehearing in the District Court, nor in appeal to the Supreme Court of Louisiana, was it suggested or asserted that the interpretation of the statute in question, of the orders of the Commissioner on authority thereof, and of the provisions of Article 5 of the leases by the District Court pursuant to the pleadings and the issues pitched and urged therein by defendants (appellees here) denied to the plaintiffs (appellants here) due process of law under the Fourteenth Amendment to the Federal Constitution; the constitutional question, first presented in motion for rehearing in the Supreme Court of Louisiana, was not, therefore, raised at the first opportunity, when the point involved was first presented for adjudication in courts of the State, and attempt, as an afterthought, to in-

ject a plea of unconstitutionality comes too late to afford basis for jurisdiction of the United States Supreme Court.

Radio Station WOW, Inc. v. *Johnson*, 326 U. S. 120 128, 89 L. Ed. 2092, 2100, 65 S. Ct. 1475;

American Surety Co. v. *Baldwin*, 287 U. S. 156, 162, 77 L. Ed. 231, 235, 53 S. Ct. 98;

Citizens National Bank v. *Durr*, 257 U.S. 99, 106, 66 L. Ed. 149, 152, 42 S. Ct. 15;

Godchaux Company v. *Estopinal*, 251 U. S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116.

II. Decision on Questions of Local Law Rests on Adequate Non-Federal Grounds

Article 11 of each of the leases sued on provides that "all terms and express or implied covenants of this lease shall be subject to all Federal and State Laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is the result of, any such Law, Order, Rule or Regulation," and by the well-established rule of law in Louisiana provisions for operations under oil, gas and mineral leases upon lands in that State are subject to, superseded and controlled by orders and regulations of the Commissioner of Conservation issued pursuant to the laws of the State, such as La. Acts 1940, No. 157 (La. Rev. Stat. 30: 2-20).

Hunter Co. v. *McHugh*, 202 La. 97, 11 So. 2d 495, 320 U. S. 222, 88 L. Ed. 5, 64 S. Ct. 19;

Hood v. *Southern Production Co.*, 206 La. 642, 19 So. 2d 336;

Hardy v. *Union Producing Co.*, 207 La. 137, 20 So. 2d 734;

Alston v. *Southern Production Co.*, 207 La. 370, 21 So. 2d 383;

Crichton v. *Lee*, 209 La. 561, 25 So. 2d 229;
Hunter Co. v. *Shell Oil Co.*, 211 La. 893, 31 So. 2d 10;
Hunter Co. v. *Vaughan*, 217 La. 459, 46 So. 2d 735;
LeBlanc v. *Danciger Oil & Ref. Co.*, 218 La. 463, 49 So. 2d 855;
Everett v. *Phillips Petroleum Co.*, 218 La. 835, 51 So. 2d 87.

It is the further established and recognized rule of law in Louisiana that failure of lessee to pay rentals and royalties due under an oil, gas and mineral lease does not afford grounds for peremptory cancellation of the lease, but that the right to cancellation is subject to judicial control under the circumstances presented.

Brewer v. *Forest Gravel Co.*, 172 La. 828, 135 So. 372;
Tyson v. *Surf Oil Co.*, 195 La. 248, 196 So. 336, 341;
Brown v. *Sugar Creek Syn.*, 195 La. 865, 197 So. 583, 592;
Risinger v. *Arkansas-Louisiana Gas Co.*, 198 La. 101, 3 So. 2d 289, 292;
Rudnick v. *Union Producing Co.*, 209 La. 945, 25 So. 2d 906, 908.

Thus, where the parties have been fully heard in the courts of the State in the regular course of judicial proceedings, a decision involving matters of state law does not present a Federal question reviewable by the United States Supreme Court. And where, as here, the state court's decision rests on an adequate and independent non-federal ground, the Supreme Court of the United States is without jurisdiction to review and consider correctness of the non-federal ground of the state decision.

Hammerstein v. *Superior Court of Cal.*, 340 U. S. 622, 623, 95 L. Ed. 586, 587, 71 S. Ct. 521;

Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U. S. 667, 674, 94 L. Ed. 1194, 1201, 70 S. Ct. 876;
Radio Station WOW, Inc. v. *Johnson, supra;*
Lynch v. *New York*, 293 U. S. 52, 54, 79 L. Ed. 191, 193, 55 S. Ct. 16;
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451.

III. Appeal Moot, Substantial Federal Question Not Involved

But even though unconstitutionality of the Louisiana statute were timely and properly raised, this appeal is moot and does not involve a substantial Federal question as the Louisiana statute in question and like statutes of other states have been held to provide a valid exercise of power by the States to regulate production of oil and gas so as to secure apportionment among landowners of the migratory gas and oil underlying their land.

Hunter Co. v. *McHugh*, 320 U. S. 222, 88 L. Ed. 5, 64 S. Ct. 19;
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 55 L. Ed. 369, 31 S. Ct. 337;
Baudini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 76 L. Ed. 136, 52 S. Ct. 103;
Champlin Ref. Co. v. *Corporation Commission*, 286 U. S. 210, 76 L. Ed. 1062, 52 S. Ct. 559;
Thompson v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, 57 S. Ct. 364;
Patterson v. *Stanolind Oil & Gas Co.*, 305 U. S. 376, 83 L. Ed. 231, 59 S. Ct. 259;
Cities Service Gas Co. v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 95 L. Ed. 190, 71 S. Ct. 215;
Palmer Oil Corp. v. *Amerada Petroleum Corp.*, 342 U. S. 390, 96 L. Ed. 1022, 72 S. Ct. 842.

MOTION TO DISMISS

And for the reasons set forth above, Appellees move and pray that this appeal be dismissed and, in the alternative, that the judgment appealed from be affirmed because the question presented has been foreclosed by prior decisions and is so wanting in substance as not to need further argument.

Leonard v. *Vicksburg, Shreveport & Pac. R. R. Co.*, 198 U. S. 416, 49 L. Ed. 1108, 25 S. Ct. 750;

Boston v. *Jackson*, 260 U. S. 309, 67 L. Ed. 274, 43 S. Ct. 129;

McArthur v. *United States*, 315 U. S. 787, 86 L. Ed. 1192, 62 S. Ct. 915.

Respectfully submitted,

(S.) Geo. Gunby,
(S.) Allen B. Guthrie,
511 Bernhardt Bldg., Monroe, Louisiana,
Attorneys for Appellees,
Carl B. Anderson and George R. Mitchell.

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Office - Supreme Court,
FILED
MAY 18 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. ~~801~~ 71

E. B. ARENDER, MARCUS N. STRONG, NEAL McEACHARN, JR., ET AL.,

Appellants,

vs.

KINGWOOD OIL COMPANY, SOHIO PETROLEUM COMPANY, GEORGE A. MITCHELL, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF LOUISIANA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OF KINGWOOD OIL COMPANY AND SOHIO PETROLEUM COMPANY.

GEO. GUNBY,
JOHN B. HUSSEY,
Counsel for Appellees.

SUPREME COURT OF LOUISIANA

No. 40,441

SOHIO PETROLEUM COMPANY

vs.

V. S. & P. R. R. ET ALS.
(in concursus)

and

GEORGE R. SUMLIN
(Plaintiff and Appellant)

vs.

KINGWOOD OIL COMPANY ET AL.
(Defendant and Appellees)

AND 26 CONSOLIDATED CASES

STATEMENT OPPOSING JURISDICTION OF SUPREME COURT OF UNITED STATES AND MOTION TO DISMISS APPEAL.

Comes now Kingwood Oil Company and Sohio Petroleum Company and except to the jurisdiction of the Supreme Court of the United States in this cause, and respectfully

moves to dismiss the appeal taken by Plaintiffs-Appellants to that Honorable Court on the following grounds:

1

The Supreme Court of Louisiana was not properly requested to and did not pass on the question of the constitutionality of Act 157 of 1940.

> The constitutionality of Act 157 of 1940 was not questioned by Plaintiffs-Appellants either in their brief or oral argument before the Supreme Court of Louisiana, and the Honorable Supreme Court of Louisiana does not mention the question of the constitutionality of this statute in its decision of these cases.

2

Even if the issue of constitutionality of Act 157 of 1940 had been tendered to the Supreme Court of Louisiana, that Honorable Court could not have considered or passed on that question because the issue of constitutionality had not been tendered to the Trial Court and could not be considered on appeal.

Womack v. *Varnado*, 209 La. 1019, 16 So. 2d 825, appeal dismissed 323 U. S. 177, 88 L. Ed. 1558, 64 S. Ct. 1287;

Southern Enterprises v. *Foster*, 203 La. 133, 13 So. 2d 491;

Causey v. *Opelousas-St. Landry Securities Co.*, 193 La. 677, 188 So. 739;

Batts v. *Marthaville Mercantile Co.*, 193 La. 1072, 192 So. 721;

Succession of Fauchon, 179 La. 333, 154 So. 15;

Abbeville v. *Police Jury*, 207 La. 779, 22 So. 2d 62;

Moledoux v. *Maestri*, 197 La. 525, 2 So. 2d 11;

State v. *Banner Cleaners & Dyers*, 170 La. 76, 127 So. 320;

Godchaux Sugars, Inc. v. *Leon Boudreaux & Bros.*, 153 La. 685, 96 So. 532;
Stubbs v. *Bain*, 173 La. 544, 138 So. 96;
Stovall v. *Monroe*, 199 La. 195, 5 So. 2d 547;
State v. *Brady*, 28 So. 2d 297;
Hixson Funeral Home v. *State*, 33 So. 2d 754;
See also: 180 La. 800, 157 So. 520;
129 La. 243, 55 So. 778;
127 La. 73, 53 So. 432;
125 La. 863, 51 So. 1016;
125 La. 55, 51 So. 66;
50 La. Ann. 1358, 24 So. 809.

3

The first time the constitutionality of Act 157 of 1940 was questioned by Plaintiffs-Appellants was in their application for rehearing before the Supreme Court of Louisiana. Question of constitutionality first presented to State Supreme Court on rehearing comes too late for consideration by the United States Supreme Court.

St. Louis etc. R. R. v. *Shepherd*, 240 U. S. 240, 36 So. Ct. 274, 60 L. Ed. 622;
Forbes v. *Virginia State Council*, 216 U. S. 396, 30 S. Ct. 295, 54 L. Ed. 534;
Cochran Oil Company v. *Arnaudet*, (La.) 199 U. S. 182, 26 S. Ct. 41, 50 L. Ed. 143.

4

In an attempt to excuse their failure to tender the issue of the constitutionality of the statute prior to their application for rehearing in the Supreme Court of Louisiana, plaintiffs-appellants contend, in their Jurisdictional Statement, that the provisions of the statute were "first raised and resorted to by the Supreme Court of Louisiana in deciding the Appeal."

That is not correct. The decision of the Supreme Court of Louisiana merely affirmed a decision of the trial court in which the trial court invoked the same statute for the same purpose and with the same effect.

5

Plaintiffs-Appellants realize that the Supreme Court of Louisiana did not directly pass on the constitutionality of the statute, in evidence of which we respectfully invite this Honorable Court's attention to the motion filed by Plaintiffs-Appellants on February 24, 1953, after their application for rehearing was denied, in which they request the Supreme Court of Louisiana to amend its opinion to show that it did pass on the constitutionality of the statute.

6

The Supreme Court of the United States has already upheld the constitutionality of Act 157 of 1940:

Hunter Company v. *McHugh*, 202 La. 97, 11 So. 2d 495, appeal dismissed 320 U. S. 722, 64 S. Ct. 19, 88 L. Ed. 5.

WHEREFORE, Appellees, Kingwood Oil Company and Sohio Petroleum Company, respectfully move that the appeal prosecuted herein to the Supreme Court of the United States be dismissed at the cost of Appellants.

Respectfully submitted,

GEO. GUNBY,
By (S.) JOHN B. HUSSEY,
Attorneys for Kingwood Oil Company and Sohio Petroleum Company.

No. 71. ARENDER ET AL. *v.* KINGWOOD OIL CO. ET AL. Appeal from the Supreme Court of Louisiana. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Clyde R. Brown* for appellants. *Geo. Gunby* for appellees. Reported below: 222 La. 383, 62 So. 2d 615.